

**Before the
UNITED STATES DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE
NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION
Washington, DC 20230**

In the Matter of)	
)	
Inquiry on Copyright Policy,)	Docket No. 100910448-0448-01
Creativity, and Innovation)	
In the Internet Economy)	

COMMENTS OF WRITERS GUILD OF AMERICA, WEST, INC.

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Background

Writers Guild of America, West, Inc. (WGAW) is pleased to submit comments to the Patent and Trademark Office and National Telecommunications and Information Administration in response to the Notice of Inquiry in the above captioned docket.¹ WGAW supported the PRO-IP Act and is encouraged that the Internet Policy Taskforce is focused on the protection of copyrighted works on the Internet. We believe it is critical that all stakeholders engage in a discussion of the problems posed by piracy as well as solutions that protect copyrighted works and their creators as well as the public interest and consumer needs.

WGAW is a labor organization representing more than 8,000 professional writers working in film, television and new media. As the bargaining representative of the creators of audiovisual content, the WGAW has a significant interest in the protection of copyrighted works. Guild members also benefit from the development of an Internet that can serve as an independent and competitive distribution platform. While television and film distribution is controlled by a handful of powerful media companies, the Internet offers a medium through which anyone with a story can find an audience. The Internet serves not only as a channel to exploit copyrighted works created for other markets, but also as a market for the creation of limitless new copyrighted works, which can bypass the gatekeepers of traditional media distribution channels and reach consumers directly. The WGAW believes that anti-piracy measures can be developed to both protect copyrighted works online and allow the continued development of a vibrant, pro-competitive Internet distribution channel.

¹ Department of Commerce, Patent and Trademark Office, National Telecommunications and Information Administration, *Inquiry on Copyright Policy, Creativity, and Innovation in the Internet Economy*, Notice of Inquiry, 75 FR 61419 (October 5, 2010).

Preventing Piracy is Necessary to Protect WGAW Members' Ability to Create Content

Effective copyright protection is essential to writers and all other workers in the entertainment industry. Guild members rely on residuals – deferred compensation based on the continuing use of creative works – as a vital form of compensation. These payments in effect serve as R&D for the entertainment industry, allowing writers to develop new material while waiting for their next employment opportunity. Some of our members famously have been nearly counted out in their careers, surviving several dry years on their residuals, only then to deliver hits such as *The Sopranos* and *Desperate Housewives*. Residual payments derived from the reuse of content not only sustain careers but also support industry health and pension plans.

In 2008, professional writers represented by the WGAW received residual payments (for the reuse of original material on DVD, in international sales, syndicated on broadcast and cable channels, sold on iTunes, streamed online and viewed in many other markets) totaling \$286 million. These residual payments constitute approximately 25% of all writer compensation. Residual payments have continued to grow, increasing approximately 5% per year over the last five years. The growth in residuals demonstrates the long-term value copyrighted works create and the importance preventing copyright theft has for the entertainment community.

Any devaluation of copyrighted content could significantly diminish the ability of writers to spend time developing this new content. Strong enforcement of copyright law benefits society as well. The ability to generate revenue through the exploitation of intellectual property provides funds that can be reinvested and fuel further innovation in many industries, including entertainment.

Protecting a Free and Open Internet is Critical to the Promotion of Diverse and Independent Content

As the Internet has become the town square of the 21st century, nondiscriminatory access to diverse and independent news, information and entertainment sources on this platform is necessary for the free exchange of ideas. In addition, the low barriers of entry online and limitless distribution opportunities of the Internet promise to spur competition across many industries, including entertainment. The result is a diverse and growing range of services, content and applications. Consumers benefit from the increased choice created by the competitive forces of an open Internet. Content creators, previously limited by traditional media distribution and the conglomerates controlling these channels, have taken advantage of an open Internet to deliver unique and innovative stories directly to consumers. *Dr. Horrible's Sing-Along Blog*, *Seth MacFarlane's Cavalcade of Cartoon Comedy* and *Web Therapy* are but a few examples of original Internet video content which have been made possible by an open Internet. Effective copyright enforcement must exist to sustain innovation, but any tools and methods must be carefully designed to ensure that the market is not foreclosed to new entrants. As such, the WGAW has strongly supported the codification of rules that maintain a free and open Internet.

Preservation of the Open Internet and Copyright Protection are Both Essential Objectives; Neither Can Be Sacrificed to Achieve the Other

Piracy threatens the ability of WGAW members to sustain and develop content. To protect the value of copyright and to preserve the benefits to society derived from the creation of intellectual property, piracy must be addressed. Piracy, however, cannot serve as a justification for discriminatory practices interfering with the free flow of lawful traffic on the Internet.

Rather, solutions to piracy must be balanced with the preservation of an open, competitive Internet and protection of consumers' right to access the *lawful* content, services and applications of their choice. Achieving this balance requires the creation of guiding principles for the development of piracy detection and prevention tools not infringing on freedom of speech and the right to privacy. Further, piracy detection and prevention tools must not be used as a means for effectively creating an unfair advantage for large media companies.

A Fair Graduated Response Policy Would Address Piracy Without Interfering With Internet Traffic

In comments to both the Intellectual Property Enforcement Coordinator and the Federal Communications Commission, the WGAW has supported a graduated response regime as a means of combating piracy. Anecdotally, the WGAW has heard from at least one American ISP that the current graduated response techniques provided for in the Digital Millennium Copyright Act (DMCA) have proved effective in stopping piracy. During an FCC Workshop on the Role of Content in the Broadband Ecosystem, a representative for the advocacy organization Public Knowledge cited a February 2009 presentation by Preston Padden of ABC/Disney at the Silicon Flatirons Conference in Colorado where Mr. Padden said "that eighty percent of the time when people get notices from ISPs saying 'I know what you're doing, stop it' they stop it."²

Graduated response is an effective tool because it gives rights holders remedies against those who pirate content and mandates strong penalties for habitual lawbreakers without interfering with the flow of traffic over the Internet. A mature graduated response regime should be characterized by fair and efficient adjudicative processes, accompanied by escalating penalties. Strong measures, such as terminating the Internet connections of chronic thieves,

² See Transcript, Federal Communications Commission Workshop on the Role of Content in the Broadband Ecosystem, p. 65.

would seriously diminish the amount of pirated content on American networks. Critical to these measures is the need for due process to ensure that legal rights are protected. Similar to the Notice and Takedown procedure of the DMCA, there must be means for those accused of piracy to respond. As a protective measure, ISPs should be required to inform the FCC and consumers when they engage in graduated response. This will create a system of accountability for ISPs, providing a check against abusive behavior.

Content Filtering and Inspection Techniques Raise Competition and Privacy Concerns

The WGAW is concerned with the effects of other, more intrusive piracy solutions such as unregulated content screening. There is a danger that content from unknown sources, while still being legal, may be slowed or blocked by such a filtering process. The result could be sites programmed by large media companies load quickly while new sites created by independent producers are caught by this filtering system. Some may argue this delay is a necessary step in addressing piracy, but it creates a significant competitive disadvantage for new entrants. Legitimate sites will lose viewers if content buffers or refuses to load because it is being screened. Further, network management practices should not be allowed to create a *de facto* fast lane for large content producers. Tools like Deep Packet Inspection (DPI), which allow Internet providers to look into packets to identify the data being transmitted, raise both privacy concerns and the potential for abuse. DPI would enable ISPs to favor certain content and frustrate other content, all in real time. Under the guise of network management, we could experience commercially motivated censorship.

Surveillance of All Internet Traffic Cannot Be Justified in Light of the Availability of Less Intrusive Means to Combat Piracy

In addition to supporting graduated response, the WGAW is actively involved through the

Copyright Alliance and other initiatives supporting both governmental and nongovernmental efforts to reduce copyright infringement. The Obama administration has made clear the importance of protecting intellectual property and has initiated a vigorous and extensive program to prevent and punish online piracy. The WGAW supports the Intellectual Property Enforcement Coordinator's (IPEC) multifaceted Joint Strategic Plan to combat online piracy. The Plan advocates transparency in developing and implementing policies; ensuring coordination among the private sector and enforcement agencies at the state, federal and international levels; and collecting data to understand the full extent of intellectual property infringement. The IPEC plan is of critical importance because of its ability to address the international scope of piracy, where a significant portion of offending businesses and websites operate.

One of the IPEC's objectives is to strengthen U.S. intellectual property law enforcement. Just last month, U.S. Immigration and Customs Enforcement (ICE) officials disabled nine websites that hosted infringing content as part of a new initiative—"Operation In Our Sites"—to combat Internet counterfeiting and piracy. Authorities executed warrants against nine domain names that offer illegal versions of newly released feature films, including TVSHACK.NET, MOVIES-LINKS.TV, FILESPUMP.COM, NOW-MOVIES.COM, PLANETMOVIEZ.COM, THEPIRATECITY.ORG, and ZML.COM, many of which generate revenue from donations and advertising. Agents from ICE's Homeland Security Investigations (HSI) were also able to seize assets from 15 bank, Paypal, investment and advertising accounts, and executed four residential search warrants in several states. The WGAW supports the strengthening of U.S. enforcement agencies that engage in thorough and transparent investigations to combat online piracy. These actions raise the profile of copyright enforcement without sacrificing Internet freedom.

Another important component of the IPEC plan is coordination of anti-piracy efforts. The Plan encourages content owners, ISPs, advertising brokers, payment processors and search engines to collaborate on efforts to combat piracy. The WGAW supports the inclusion of ad brokers and payment processors such as credit card companies in anti-piracy efforts. Many sites that stream illegal content rely on revenue from advertisers and payment processors. In fact, many consumers cannot differentiate between legal and illegal sites because they can purchase the infringing content using a credit card. If these revenue sources were cut off, many of these sites would cease to exist. The IPEC's effort to include these entities in its voluntary anti-piracy response represents a creative development in the war against copyright infringement, and we believe that legislation can improve participation by these entities.

S. 3804, the Combating Online Infringement and Counterfeits Act (COICA), represents a positive development in the effort to diminish piracy. COICA not only creates a legal process empowering the Department of Justice to shut down websites hosting or streaming unauthorized content but also contains measures that will enable payment processors and advertising networks to deprive pirates of financial resources. This bill takes direct aim at those who profit from unauthorized distribution of copyrighted works without sacrificing the freedom of the Internet. The WGAW supports COICA because we believe that preservation of an open Internet and copyright protection are both essential objectives; neither of which can be sacrificed to achieve the other.

Conclusion

The Internet represents a new and important distribution channel for content. It advances the ways in which creators can deliver content to consumers. While much of the audiovisual content currently delivered via the Internet is television shows and feature films, the advent of

this new channel makes possible the expansion of diverse and independent content currently foreclosed from traditional entertainment platforms. To protect the Internet as well as the content available on it, we must develop tools and techniques that address piracy without sacrificing an open Internet and consumer rights to privacy. The WGAW believes that the piracy measures suggested in this filing will achieve such a goal, enabling further content innovation on an open Internet.